Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Petition of the United States Telecom Association for a Rulemaking To Amend Pole Attachment Regulation and Complaint Procedures	)	RM No. 11293
	)	
	)	

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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The United States Telecom Association (USTelecom)[1] submits its reply comments in response to comments opposing its Petition for Rulemaking (Petition)[2] in the above-referenced matter.

INTRODUCTION AND SUMMARY

USTelecom responds here to the comments filed by parties opposing USTelecom's Petition for Rulemaking. USTelecom shows that the opponents of the requested rulemaking proceeding put forth weak and unpersuasive arguments. Specifically, USTelecom demonstrates that: (1) the specific meaning given to the term "telecommunications carrier" in section 224(a)(5) of the Telecommunications Act of 1996 (Act) cannot be extended to cover all references to a "provider of telecommunications services" in section 224 because doing so would violate common sense and canons of statutory construction; (2) the opponents' arguments based on the joint use agreements between electric utilities and incumbent local exchange carriers (ILECs) are irrelevant with respect to the requested rulemaking; (3) the rules USTelecom seeks to implement

[1] USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

[2] *Petition of the United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005).

are enforceable; and (4) there is more than sufficient evidence in the record to support the requested rulemaking. USTelecom urges the Commission to initiate a Notice of Proposed Rulemaking and to adopt rules that implement the provisions in the Act that provide ILECs, as providers of telecommunications services, with the right to just and reasonable rates, terms, and conditions for pole attachments and with the right to have disputes regarding such rates, terms, and conditions heard and resolved.

DISCUSSION

I. The Terms "Telecommunications Carrier" And "Provider Of Telecommunications Services" Are Not Synonymous For Purposes Of Section 224.

A number of commenters argue that the terms "telecommunications carrier" and "provider of telecommunications service" are synonymous or interchangeable, which they claim renders USTelecom's Petition insincere and an attempt to rewrite the Act.[3] A careful reading of the Act, however, reveals the contrary – the terms as used in section 224 are not the same. "Telecommunications carrier" is plainly redefined to be a subset of "provider of telecommunications services." Moreover, those arguing that the terms are interchangeable in section 224 would have the Commission violate canons of statutory construction, notably the concept that all terms must be given meaning.

Outside of section 224, a "telecommunications carrier" and a "provider of telecommunications services" are largely synonymous and ILECs are covered by both terms. However, in section 224(a)(5), when Congress excluded ILECs from the meaning of "telecommunications carrier," but made no similar limitation in the meaning of the term

[3] *See* FirstEnergy Comments at 7-11, American Electric Power Service *et al.* Comments at 3-7, Ameren *et al.* Comments at 8-9, UTC/EEI Comments at 7, Exelon Comments at 3-4, EEI Comments at 2-3.

"provider of telecommunications services," Congress effectively differentiated the terms for purposes of section 224. Simply put, section 224 excludes ILECs from the definition of a "telecommunications carrier," but establishes no such exclusion for a "provider of telecommunications services;" therefore, a "provider of telecommunications services" necessarily includes ILECs. Accordingly, for purposes of section 224, the term "provider of telecommunications services" is broad and inclusive, while the term "telecommunications carrier" is a more specific, narrow term. In other words, a "telecommunications carrier" is a subset of a "provider of telecommunications services." Had Congress intended for the term "provider of telecommunications services" to exclude ILECs, it could have so specified. Even without such a definitional exclusion, had Congress intended to exclude ILECs from the protections of section 224 entirely, it could have used the term "telecommunications carrier" throughout section 224. Either of these changes would have accomplished what the Petition opponents desire. Instead, however, Congress limited only one of two terms in section 224 and, then, it used the two terms in different parts of the section. The natural reading, therefore, is that the two terms have different meanings in section 224 and, indeed, according the same meaning to the two terms in this context would violate the canon of statutory construction that the language must read so as to give meaning to all of the words.[4]

In addition to differentiating the meaning of "telecommunications carrier" and "provider of telecommunications services" in section 224, Congress also only excluded ILECs from the

[4] *See, e.g., Donnelly v. FAA*, 411 F.3d 267, 272 (D.C. Cir. 2005) and *Murphy Exploration & Production Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001). In addition, the maxim *expressio unius est exclusio alterius* applies; according to Black's Law Dictionary, "[u]nder this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." BLACK'S LAW DICTIONARY, 581 (6th ed. 1990).

application of section 224 where the term "telecommunications carrier" is used – in subsections (e) and (f). In subsection (e)(1), Congress provided that

> [t]he Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges.

In subsection (f)(1), Congress provided that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." In creating a market for competition, Congress believed it was important that new entrants that were not traditional pole owners be guaranteed access to poles and that there be a date certain when regulations would be implemented to prescribe default rates for such access. As the Commission is well aware, because ILECs already had their own poles, access to the poles of other utilities and, presumably, reasonable rates that had already been established through commercial negotiations, the need for Congress to provide an explicit right of access for ILECs was not necessary. Nor was the need for the Commission to establish immediate default rate regulation for ILECs as attaching entities readily apparent. However, the absence of a specific provision addressing regulations for default rates for ILEC access to other utilities' poles does not negate the broad dictate that applies to all providers of telecommunications services: the Commission must ensure that the rates, terms, and conditions for pole attachments are just and reasonable and must adopt procedures necessary to hear and resolve complaints about such rates, term, and conditions. As providers of telecommunications services, ILECs, like competitive local exchange carriers (CLECs) and cable television system (CATV) providers, are entitled to regulations that set default rates for pole attachments to ensure

that a utility charges just, reasonable, and nondiscriminatory rates when commercially negotiated rates cannot be reached.

The Commission should remain focused on the "big picture" while interpreting the meaning of section 224. Congress did demonstrate an intent to ensure that CLECs be able to gain access to poles quickly after the passage of the Act in the two provisions of section 224 where the limited term "telecommunications carrier" is used. This special concern, however, in no way contradicts or limits the overriding Congressional interest in ensuring that pole owners charge just and reasonable rates rather than abuse their market power to extort unjust and unreasonable rates. Pole owners cannot reasonably argue that Congress was not concerned with preventing them from abusing ILECs that attached to the poles of electric utilities and that have increasingly become locked into using the poles of electric utilities. Moreover, Congress clearly expressed a statutory preference for broadband deployment, which is facilitated by competitive neutrality among pole attachment customers.

Several commenters, citing the Commission's Pole Attachment Order addressing the implementation of section 703 pole attachment provisions of the Act,[5] argue that the Commission has already determined that the exclusion of ILECs from the term "telecommunications carrier" in section 224(a)(5) means that ILECs are not entitled to any section 224 rights.[6] This reading of the Pole Attachment Order is incorrect. The proper interpretation of this order must incorporate a careful reading of the Act and the distinction

[5] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules Governing Pole Attachments*, Report and Order, CS Docket No. 97-151 (rel. Feb. 6, 1998) (Pole Attachment Order).

[6] *See* Ameren *et al.* Comments at 4-5 and American Electric Power Service *et al.* Comments at 12.

between a "telecommunications carrier" and a "provider of telecommunications services" as those terms are defined in section 224 of the Act.

In paragraph five of the Pole Attachment Order implementing the section 703 pole attachment provisions, the Commission stated that:

> [t]he 1996 Act . . . specifically excluded incumbent local exchange carriers . . . from the definition of telecommunications carriers with rights as pole attachers. Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by *ensuring the availability of access to new telecommunications entrants*.[7]

All that the Commission could, and did, mean by this statement is that ILECs do not have the rights given only to telecommunications carriers in section 224 – that is, the right to nondiscriminatory access as provided to telecommunications carriers in subsection (f)(1) and the right of default regulated rates set within two years after the date of the Act as provided to telecommunications carriers in subsection (e)(1). However, ILECs retained other rights granted to "providers of telecommunications services" by section 224 (*i.e.*, the right to just and reasonable rates, terms, and conditions and the right to have complaints about such rates, terms, and conditions heard and resolved).

It becomes even more clear later in the Pole Attachment Order that the Commission understood the distinction between a telecommunications carrier and a provider of telecommunications services as applied in section 224 and the purpose that the limitation of the term "telecommunications carrier" was intended to serve. In paragraph 49 of the Pole

[7] Pole Attachment Order, ¶5 (emphasis added).

Attachment Order during a discussion of pole attachers that should be counted for apportioning the cost of unusable space on a pole the Commission stated:

> The exclusion in Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to the purpose of amended Section 224, to provide an important means of *access*. *ILECs generally possess that access and Congress apparently determined that they do not need the benefits of Section 224*. The fundamental precept of the 1996 Act was to enhance competition, and the amendments to Section 224, like many of the amendments to the 1996 Act, are directed to new entrants. In contrast, Section 224(e), which delineates a new means to allocate costs, does not refer to 'telecommunications carriers,' but to 'attaching entities.' Moreover, *the term pole attachment is defined in terms of attachments by a 'provider of telecommunications service' not as an attachment by a 'telecommunications carrier.'*[8]

Similarly, one commenter argues that the Commission has already addressed the subject of USTelecom's Petition in the Local Competition Order,[9] but this is not true. What the Commission made clear in the Local Competition Order was that ILECs do not have a right of access to the facilities or rights-of-way of a local exchange carrier or any utility under section 224 or section 251(b)(4). Specifically, the Commission stated:

> [s]ection 224 does not prescribe rates, terms, or conditions governing *access by an incumbent LEC to the facilities or rights-of-way of a competing LEC*. Indeed, *section 224 does not provide access rights to incumbent LECs*. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, *no incumbent LEC*

[8] Pole Attachment Order, ¶49 (emphasis added).

[9] *See* American Electric Power Service *et al.* Comments at 15; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325 (rel. Aug. 8, 1996) (Local Competition Order).

> *may seek access to the facilities or rights-of-way of a LEC or any utility* under either section 224 or section 251(b)(4).[10]

However, the Commission did not address the claims before it now – that ILECs as providers of telecommunications services are entitled to just and reasonable rates, terms, and conditions for pole attachments and to have complaints regarding unjust and unreasonable rates, terms, and conditions heard and resolved, pursuant to sections 224(a)(4) and (b)(1).

The Commission should not be swayed by the attempts of some commenters to create confusion about the meaning of the terms "telecommunications carrier" and "provider of telecommunications services" as they are used in section 224. By limiting only the term "telecommunications carrier," but not the term "provider of telecommunications services," Congress created different meanings for the two terms. Further, Congress limited its use of the term "telecommunications carrier" in section 224, thereby excluding ILECs only from the right of access to pole attachments and from the right of regulated rates by a date certain after the Act. Even though Congress could have excluded ILECs from all rights related to pole attachments by defining a "provider of telecommunications services" to exclude ILECs or by using the term "telecommunications carrier" pervasively throughout section 224, it did not do so. The Commission must adhere to the provisions of section 224 as applicable to both telecommunications carriers and providers of telecommunications services.

II. The Existence Of Joint Use Agreements Does Not Alter The Requirement That The Rates, Terms, And Conditions For Pole Attachments By ILECs Be Just And Reasonable, Consistent With Section 224 Of The Act.

A number of commenters have focused their comments on arguments related to joint use agreements between electric utilities and ILECs, claiming that USTelecom has ignored the

[10] Local Competition Order, ¶1231 (emphasis added).

differences between joint use agreements and pole attachment agreements and that ILECs have shirked their joint use responsibilities.[11] These claims are nothing more than an exaggerated attempt to distract the Commission from the requirements set forth in section 224 of the Act, which requires the Commission to regulate the rates, terms, and conditions of pole attachments to ensure that they are just and reasonable.

There has been a long history of joint use agreements between electric utilities and ILECs. While there is still a need for joint use agreements because there are still environmental, safety, and efficiency reasons to avoid dual poles as well as local government prohibitions on duplicate poles, technological advancements and operational changes in both the electric utility and telecommunications industries have altered some of the historical premises of joint use agreements – specifically that electric utilities and telephone companies use roughly the same amount of space on poles; that it makes sense for electric utilities and telephone companies to split the costs of poles; and that electric utilities and ILECs have equal bargaining power with respect to their commercially negotiated joint use agreements.

Today's reality is much different thereby making many of the prior assumptions upon which joint use agreements were based no longer applicable. For example, because of technological changes in telecommunications equipment, telephone companies typically occupy less space on poles than they did in the past. In addition, attachers today include more than just an electric utility and a telephone company on a pole. Cable companies, CLECs, and wireless

[11] *See* American Electric Power Service *et al.* Comments at 17-19, UTC/EEI Comments at 13-15, and FirstEnergy Comments at 4-6.

providers are all accessing the same poles.[12] The existence of multiple attachers on a pole should provide an opportunity for these entities to share the pole costs based on their relative use of the pole, rather than creating an opportunity for an electric utility to recover more than the costs of the pole by charging ILECs disproportionate rates for their attachments.[13]

Today's reality also reflects the fact that electric utilities own or control the majority of poles nationwide. For example, as FirstEnergy explains, it owns approximately 65% of the poles it shares with ILECs.[14] This pole ownership imbalance is not uncommon and certain electric utilities are leveraging this power to engage in unjust and unreasonable pole practices.

Technological advancements and operational changes, combined with the recent actions of some electric utilities to impose unjust and unreasonable rates, terms, and conditions on ILECs have prompted the need to request that the Commission implement regulations consistent with section 224(b)(1). Contrary to the claim of FirstEnergy, USTelecom did not "discover" a Commission mistake regarding pole attachment rights.[15] Unlike the requirement of section 224(e)(1) that the Commission implement regulations within two years of the date of the Act for "telecommunications carriers," the Act did not impose a deadline for implementation of regulations to address the broader requirements of section 224(b)(1). However, now that there is

[12] FirstEnergy explains that an electric utility is usually allocated eight feet on a pole due to safety and operational requirements while an ILEC is usually allocated between two and three feet on the same pole. *See* FirstEnergy Comments at 6.

[13] The truth is that electric utilities that are unjustly and unreasonably raising pole attachment rates they charge to ILECs are not really interested in charging equitable and commercially reasonable rates for the use of their poles. Instead of negotiating commercially just and reasonable rates, they often seek to base pole attachment rates on avoided costs, which if implemented results in the pole owner recovering more than the worth of the pole and likely causes the consumer of the attaching entity to pay more than it should for its service.

[14] *See* First Energy Comments at 4.

[15] *See id*. at 2.

a clear need to implement regulations to ensure just and reasonable rates, terms, and conditions for all providers of telecommunications services, it was appropriate for USTelecom to file its Petition.

With the arrival of competition spurred by the Telecommunications Act of 1996, and even before such competition, there has been an increasing number of telecommunications and other service providers that want to attach, and have rights to attach, to utility poles. Evenly splitting the cost of a pole may have made sense when there were just two attachers on a pole – the electric utility and the telephone company.[16] Today, however, electric utilities can recover their costs from all attachers and they should not be able to demand that ILECs pay comparatively more of the cost of a pole than do CLECs or CATV providers.[17] Effectively the

[16] FirstEnergy claims that under joint use agreements ILECs are "entitled to rent portions of their allocated space to other telecommunications attachers." FirstEnergy Comments at 6. If this were true, ILECs could arguably defray some of the cost of their share of pole, possibly creating a more fair attachment rate. However, in most instances when an ILEC rents out a portion of its space to another attacher, if it is even permitted to do so, the electric utility claims the amount paid by the other attacher is owed to the electric utility as the owner of the pole, not the ILEC. Interestingly, ILECs have found in some cases where they are allocated two feet on an electric utility pole but are only using one foot of that allocation that the electric utility has permitted other attachers (such as CATV providers and municipalities placing street lights) to attach to the pole in the ILEC's allocated space, often resulting in the electric utility charging twice or even three times over for the same space. When ILECs have confronted electric utilities about the placement of other attachments in their allocated space their requests to reduce their rates are rebuffed.

[17] FirstEnergy seemingly admits that it is charging ILECs more than their fair share for their use of electric utility poles when it stated that "[a] better solution to any anticompetitive concerns of the ILECs is to require all attachers to pay a more equitable share of pole attachment costs." FirstEnergy Comments at 3. Later in its comments FirstEnergy also states that "the solution is to require the CLECs to pay for their fair share of the costs of owning and maintaining the ILEC and electric utility distribution systems, *see id*. at 17, and that "Congress must amend the Act to permit fairer, more equitable rates," *see id.* at 18.

FirstEnergy's counsel has even written an article that was published in an industry trade magazine guiding electric utilities on how to use the current regulatory landscape to recover a disparate share of its pole attachment costs from ILECs. That article states that "[u]tilities may

Act contemplated this problem and provided direction to the Commission to avoid or remedy it, by stating that the "Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[18]

With their claims that ILECs are shirking their joint use responsibilities and disassociating themselves from equitable participation in joint use agreements, the electric utility commenters also are attempting to distract and confuse the Commission from the issue at hand – that some electric utilities are subjecting ILECs to unjust and unreasonable pole attachment practices. Still, USTelecom will address these claims in an effort to re-focus the Commission's attention on the matter of electric utilities imposing unjust and unreasonable rates, terms, and conditions on ILECs.

The electric utilities have an operational advantage when it comes to the placement of poles. This advantage may make it appear that ILECs are not fairly sharing the burden of joint use, but the reality is that there has been a natural erosion of ILECs' share of pole ownership.[19]

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negotiate UNREGULATED rates, terms and conditions for access to . . . distribution poles by ILECs . . . ." Tom Magee, "A Joint-Use 'Bill of Rights:' Ten Inalienable Rights Utilities Have for Dealing with Pole Attachments," Transmission & Distribution World, pp. 64-65 (Sept. 2004) (emphasis in original) (*see* BellSouth Comments, Attachment B). Electric utilities are advised they can apply "more utility-friendly cost-based rate formulas" for the unregulated attachments provided to ILECs. *Id*. at 65.

[18] 47 U.S.C. §224(b)(1).

[19] Some experts estimate that ILECs now own anywhere from 0% to 30% of the poles they share with electric utilities, and individually some ILECs may own as little as 0% to 10% of such shared poles, as a direct result of the "primacy of electricity." *See* Veronica Mahanger MacPhee & Mark Simpson, "Two Wrongs Don't Make a Right: The Electric Industry's Exploitation of its Captive Pole User Market," (Mahanger Consulting Associates, 2005) (*see* BellSouth Comments, Attachment A).

When new real estate developments are being built, the power companies place facilities before the telecommunications companies; access to power is necessary before telecommunications service can be provided. As a result, electric utilities typically have the first opportunity to install new poles.[20] Another imbalance in joint use arrangements between electric utilities and ILECs occurs when ILEC poles are replaced by electric utility poles, often without notice to ILECs and without any intention on the ILEC's part to transfer the ownership of the pole to the electric utility.

As the above demonstrates, the imbalance in pole ownership between electric utilities and ILECs is easily and, in many cases, understandably explained. Again, the important reality is that ILECs are increasingly becoming minority pole owners.[21] Although they complain about the imbalance, USTelecom suspects that electric utilities find the imbalance preferable, especially when they can use their ownership advantage to impose unjust and unreasonable rates, terms, and conditions.

[20] Similarly, electric companies usually have the first opportunity to repair poles. Natural disasters and severe weather conditions often result in down power lines. Because of the danger associated with down power lines and the need to resolve those dangers before other repairs are attempted, electric utilities often perform initial repairs to poles.

[21] As ILECs ownership of joint use poles decreases, it is increasingly difficult for ILECs to negotiate new joint use agreements or to amend existing joint use agreements. In some instances when ILECs have sought to negotiate new joint use agreements, they are presented with two agreements that have different terms and conditions – one agreement governs the ILEC's access to the electric utility's poles while the other agreement governs the electric utility's access to the ILEC's poles. Such agreements are more akin to license agreements than they are to the joint use agreements established more than 50 years ago. The changes in these agreements may be understandable given the changes in the environment under which the joint use agreements of the past were established. However, as these agreements change so do the protections they previously contained. In light of these changes, it is disingenuous to argue that "a natural governor limits abuse in any joint use arrangement [because] each party is dependent upon access to the other's poles, so each is motivated to treat the other in a fair and nondiscriminatory manner on mutually acceptable terms and conditions." FirstEnergy Comments at 5.

III. The Rules USTelecom Is Seeking Are Enforceable.

One commenter claims that the rules USTelecom seeks in its Petition are unenforceable, using a hypothetical scenario to explain that an electric utility could subvert any default rate rules implemented by simply denying the ILEC access to the electric utility's poles.[22] USTelecom sincerely hopes this comment was not intended to be a veiled threat. Putting that concern aside however, the fact is that the reason ILECs were not provided with assured access to the poles of other utilities is because Congress did not believe that ILECs needed the protection of regulated access because they already had poles, had access to electric utility poles, and already were attached to such poles.[23] In a different world where ILECs did not already have access to the poles of electric utilities, Congress might have, and still could, mandate access. While ILECs have the ability to install their own poles, and in many cases do install their own poles that are also shared by electric utilities, it makes no sense from an environmental, safety, or efficiency perspective to force ILECs to install duplicative poles in order to provide consumers with communications services. The Commission cannot allow electric utilities to hold ILECs hostage to an ultimatum that ILECs either agree to unjust and unreasonable rates, terms, and conditions imposed by the electric utilities or be denied access to their poles, especially since the Act was written in the context that ILECs already had access to electric utility poles and given the

[22] *See* Exelon Comments at 5.

[23] As noted previously, the Commission noted in the Pole Attachment Order that with respect to poles attachments "*ILECs generally possess that access and Congress apparently determined that they do not need the benefits of Section 224*. The fundamental precept of the 1996 Act was to enhance competition, and the amendments to Section 224, like many of the amendments to the 1996 Act, are directed to new entrants." Pole Attachment Order, ¶49.

specific provisions of section 224 that reserved the right to just and reasonable rates, terms, and conditions for pole attachments to all providers of telecommunications services.

IV. The Commission Must Act Now To Preserve Competition; The Record Evidence Demonstrates That ILECs Are Being Unreasonably Discriminated Against By Electric Utilities.

"The fundamental precept of the 1996 Act was to enhance competition, and the amendments to Section 224, like many of the amendments to the 1996 Act, are directed to new entrants."[24] Almost 10 years after the enactment of the Act, competition in the communications industry is firmly rooted, yet portions of section 224, specifically, sections 224(a)(4) and (b)(1), have not been implemented with Commission regulations. With the recent efforts by some electric utilities to take advantage of the lack of such regulations, certain segments of the industry are receiving favorable treatment while others are subject to unjust and unreasonable practices. This disparity has an anti-competitive impact, which is completely contrary to the Act's fundamental precept of enhancing competition. Electric utilities must not be allowed to leverage their position as owners of the majority of poles across the country or the technological and operational advantages they have with respect to their poles to extract monopoly-like rates from ILECs that must attach to electric utility poles. The Act does not permit this. It is imperative that the Commission act now, particularly in light of the unjust and unreasonable rates, terms, and conditions that some electric utilities are attempting to impose on ILECs, by initiating the requested rulemaking and moving forward with adoption of rules to ensure that all pole attachers have just and reasonable rates, terms, and conditions as required by section 224(b)(1) and, more fundamentally, to preserve competition.

[24] Pole Attachment Order, ¶49.

Compelling evidence of discrimination has already been submitted into the record. Alltel provided a concrete example of the discrimination it is experiencing, showing that its CLEC affiliate is charged a $6 per pole rate by an electric utility while the same electric utility is demanding a $54 per pole rate from Alltel's ILEC subsidiary, a rate that is 900 percent higher than the rate charged to the CLEC affiliate.[25] Similarly, BellSouth submitted evidence that it has faced rate increases in excess of 300 percent from electric utilities for attaching to their poles.[26] Likewise, CenturyTel explained that in several instances it has conducted negotiations lasting as long as six years with power utilities that have sought to increase rates for ILEC attachments with the result being a rate increase that is 50 percent higher than rates charged to CLECs.[27] There is a strong record of evidence upon which the Commission can take action and which clearly demonstrates the need for action now.[28]

[25] *See* Alltel Comments at 3-4.

[26] *See* BellSouth Comments at 4.

[27] *See* CenturyTel Comments at 2.

[28] The evidence already submitted into the record renders moot the claim of one commenter that USTelecom has not met its evidentiary burden of demonstrating that new regulations should be adopted. *See* American Electric Power Service *et al.* Comments at 16-19. It is also worth noting that this commenter inaccurately states that the new regulations sought would expand the Commission's jurisdiction over pole attachments by ILECs. *See id.* at 16. In fact, the Act already provides the Commission with this jurisdiction by virtue of sections 224(a)(4) and (b)(1).

CONCLUSION

For the reasons stated in its Petition, USTelecom respectfully requests that the Commission initiate the requested rulemaking to amend its rules consistent with sections 224(a)(4) and (b)(1) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on December 19, 2005, the aforementioned Reply Comments of The United States Telecom Association were electronically filed with the Commission through its Electronic Comment Filing System and electronically mailed to the following:

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